The Quantity Surveyor as Expert Witness

This article discusses a number of legal and practical issues that are critically important to expert witnesses, principally their overriding duty to the court and the arbitral tribunal (including its financial as well as its professional obligations), report writing, meetings of experts, the giving of evidence and the immunity of experts, from the particular perspective of the quantity surveyor.

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Introduction

Expert witnesses have attracted the attention of the courts for some years, generally on a rather unfavourable basis. The English High Court called attention in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)*[1], where it listed what it considered to be the essential guidelines with which an expert should comply. In short, those guidelines focussed on the need for independence, "uninfluenced by the exigencies of litigation", and complete disclosure of assumptions, evidence relied upon and any changes of view.

From a public point of view, perhaps the most important event was the evidence given by Professor Sir Roy Meadow in criminal cases concerning cot deaths, in particular his foray outside his expertise into the area of statistics, which was thought to have profound and unfortunate influence on the juries involved. Sir Roy suffered subsequently for this opinion, but not as much as those convicted as a result of his evidence.

Other cases before the courts have dwelt on the tendency of experts to stray into areas outside their expertise, or to give opinions without fully equipping themselves with the necessary factual knowledge. *Skanska Construction UK Limited v Eggar (Barony) Ltd* [2] addressed this point. The problem of bias seems to dominate the function of expert *(Pearce v Ove Arup Partnership Ltd* [3]) and is ever present.

The role of the expert

The courts have therefore paid much attention to the role of the expert. This matter is also dealt with in the English Civil Procedure Rules (1999) ('CPR') and more recently in the Civil Justice Reform in Hong Kong ('CJR').

It is now clear that a person should only act as expert if he has -

- the ability to act impartially;
- the experience, knowledge and expertise appropriate for the assignment; and
- the resources to complete the assignment within the timescale and to the required standard.

Impartiality is a crucial matter and the following factors impact upon it -

- conflicts of interest;
- prior involvement with either party;
- existing commitments with either party;
- any dual role, ie whether an expert has given advice to either party on the matter; and
- whether the expert has assisted a party with the preparation or defence of claims.

The expert should consider these factors honestly and decide whether he can discharge his duties to the tribunal. There is now a general requirement to sign a Statement of Truth under both the CPR and the CJR in court proceedings. Such a requirement is desirable in arbitrations also. There is an overwhelming emphasis on the need to note that the expert's duty is to the tribunal and not to the paying client.

A typical Statement of Truth would read as follows:

"I confirm that in so far as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion."

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The Hong Kong Rules of the High Court (Cap 4A) ('RHC'), as amended by the Rules of the High Court (Amendment) Rules 2008, state, in Ord 38 (Evidence) at rule 35, that -

- it is the duty of an expert witness to help the Court on matters within his expertise;
- the duty overrides any obligation to the person from whom the expert witness has received instructions or by whom he is paid[4].

Perhaps the key starting point is in the appointment of the expert. The

points to address in this regard are -

- obtaining clear instructions;
- incorporating instructions in the report;
- changing instructions;
- adopting the report as a statement of case by the parties;
- terms of appointment and getting paid;
- the expert as a 'distress purchase' by one or other of the parties.

The above are areas of key concern to the quantity surveyor (QS) as expert. Obtaining clear instructions may not be easy because it is not always practical for a solicitor to formulate them until he has had the expert's initial advice. It is common for one or both parties to adopt the QS's valuation as its pleaded case at some stage in the proceedings and this places a different emphasis on the QS's role, particularly in the joint meetings that take place with the other expert(s).

Financial implications for experts

One of the most difficult practical issues for the expert is that of fees and getting paid. Few employers take a realistic view of the demands placed on the expert and the need for attention to detail and for rigour, with consequent fee implications. Requests for budgets at the outset or even fixed price lump sums with an emphasis on economy are normal. The expert must balance this with the demands of the court and his duty thereto. It is vital to remember that the course of meetings between experts and subsequent follow-up and the course of hearings are largely unpredictable and that there is no way of shortcutting the exercise once the expert has embarked upon the task. He must do it comprehensively and fully, and cannot avoid the task because he finds himself running out of fees. He underestimates this at his peril.

What if the client does not pay the expert? All usually starts well enough but it is common for the overall costs to escalate beyond the employer's expectations and he either does not have the funds available or simply chooses not to pay.

Notwithstanding the above, the expert must not skimp on the service because of unpaid fees. It is here that his duty to the tribunal before the client takes on a painful meaning.

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The expert's opinion

It is essential for the QS to understand that he must support the views expressed in his opinion. Statements such as "I consider the rate should be $x per m²" without any explanation of the source or justification will not help the tribunal. Worse, two opposing views expressed in such a manner offer no means of decision. It is surprisingly common for those who are new to the role to consider this to be all that it necessary.

Equally, it is not acceptable for the expert simply to rely on what others may have told him. Sometimes it is essential that he should make enquiries (say as to a market rate), but it is essential to record the enquiry in detail and to state who gave it and in response to what question. If the expert has reservations, they must be expressed [5].

Meetings of experts

It is now expected that there will be meetings of experts. The normal sequence (discussed below) is -

- preparation of 'without prejudice' reports;
- meeting of experts;
- joint reports;
- changing views and consultation with clients;
- final reports;
- rebuttal reports;
- supplemental reports.

There are grounds for doubt about the benefit of 'without prejudice' reports. They allow for unequal attention to the matter by experts and, bearing in mind that the tribunal does not have sight of the reports, there is little that can be done about this.

The meeting of experts is normally straightforward, but there may be problems. For example, instructing solicitors and clients may not give experts full authority to agree anything.

The format of joint reports should not raise difficulties, particularly with QSs who are normally concerned with valuation, but there may be a difference in expectation both as to the extent of the joint reports and as to their format. It may be desirable for party solicitors to attend (assuming they have not done so from the outset).

It is essential for the expert to be prepared to change his opinion (hence the advantage of the 'without prejudice' report) but it is equally right that he should consult and discuss this with his solicitor and client. They are entitled to know and be given the opportunity to question any changes in opinion as this will affect their position in the case. The QS should consider their comments and deal with them appropriately.

Rebuttal reports may not be necessary in most instances, given the joint meetings and reports, assuming that the process has worked properly. If not, however, then they may be useful.

It is commonplace for supplemental reports to be served, with opinions being developed and changed as time goes by, and these may continue to be produced right into the hearing.

When dealing with the other side's expert, the following will need to be addressed -

- the joint report and its format;
- what has and has not been agreed with that expert, and why not;

- what to include in the joint report, and how detailed it should be – eg in dealing with differences of view;
- whether one party should take the lead in preparing the joint reports (eg the claimant's expert), or whether both should work on the matter together;
- whether solicitors should attend joint meetings;
- the ongoing need to discuss and amend joint reports;
- compromise settlements with the client's agreement, eg splitting the difference on minor or unimportant issues (though clients may not permit such a form of compromise).

When experts meet, they inevitably share information. Frequently, this information has been passed to them by their client and may not be included in the disclosed documents. This can be very troublesome and experts should be alert to it. They should ensure that each side has the same information and has been able to use it in preparing 'without prejudice' reports. Such discrepancies must be drawn to the attention of the instructing solicitor, who should ensure disclosure.

The expert at the hearing

A number of points are worthy of mention in this regard.

- It is vital that the QS is thoroughly familiar at the hearing with his own report and the documents he has relied upon. Thorough revision of these in preparation for cross-examination is essential.
- It is also essential to know the other side's report and anticipate questions being asked on it.
- Be prepared to make concessions during cross-examination.
- Beware of re-examination, as it is easy to misunderstand where Counsel is coming from.
- Be aware that you are out of communication during the giving of evidence, especially if you have used assistance.

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It is normal for the expert to be asked to assist Counsel in cross-examination of relevant factual or expert witnesses. In particular, he may be asked to advise on cross-examination points on the other side's expert report. It may be difficult to know how far to go with this, but it should be remembered that the expert's role is neutral and not adversarial.

If the expert has made mistakes, then it is essential to admit to them and to advise Counsel and the tribunal no later than the giving of evidence.

The dual role of experts

QSs often face difficulty in having to conduct dual roles. They may be engaged during the contract to provide advice. Obviously, if that advice conflicts with the opinion that the expert wishes to give, a difficulty arises. For this reason, it is probably not advisable to offer expert opinion on a matter where the expert or his company have previously been engaged.

It is equally common, however, for the appointed expert to be asked to offer advice on pleadings and on the merits of the client's case. This may be unavoidable, but the expert should appreciate that he is wearing two hats, and that his liability as an adviser is different from that as an expert. He may be immune from suit in offering expert opinion (but not necessarily), but he is certainly not protected in giving advice as a consultant.

Experts and contingency fees

Clients may seek to conclude contingency fee agreements with experts, either for their advice or for acting as expert. Such fees are not permissible for a QS expert. It may be that the expert's company is engaged by the party to the dispute and perhaps has a contingency fee arrangement for the contract in question. It appears that the courts have given the green light to experts acting in such circumstances. It is, however, only with extreme caution that an appointment on such terms should be considered, as the credibility of the expert's evidence will inevitably be attacked[6].

Single Joint Experts

Courts have become enthusiastic about appointing Single Joint Experts ('SJE')[7]. The following points may be made -

- the SJE system may offer economy in small disputes;
- it is, however, problematical in large disputes, where each side wants its own expert (solicitors need expert advice in conducting the proceedings in any event);
- possible problems in making an appointment that is acceptable to both sides;
- there is a danger of having the case presented twice, firstly to the SJE and then to the tribunal;
- arbitrators may have difficulty in containing questions from parties;
- it is difficult for Counsel if the SJE's views prove unacceptable, as at some stage the latter must become a hostile witness;
- the SJE sounds attractive, but does it really work? There are varying opinions.

Immunity of experts

Experts often consider themselves fireproof in the role they undertake. Are they?

- Experts are immune from liability in giving opinion evidence.
- Immunity does not extend to the provision of advice that is separate and not part of their opinion evidence.
- Immunity does not extend to criminal prosecution for perjury, perverting the course of justice or contempt of court.
- Immunity does not extend to actions by a professional body[8].
- Immunity does not extend to libelling the other side, or malicious evidence.
- Immunity does not cover breach of confidence where an expert report is disclosed to others without consent of the instructing party.
- Immunity does not protect an expert from having to pay wasted costs.
- The safest course is therefore to assume that immunity may not apply.

Conclusion

An aspiring QS expert, on reading the above discussion, may perhaps justifiably conclude that the role is fraught with hurdles and pitfalls. The background is now very legalistic and full knowledge of the legal requirements and expectations of an expert is essential, as well as the high level of technical expertise for which an expert is appointed. Clients expect an expert's services at a rock bottom price, though they must be performed in accordance with the varying programmes set by the court or tribunal. This makes it essential to use a team of assistants on all but the simplest of cases, thus presenting a stressful job for the expert, who must closely manage and check all that they do.

The process, whilst at times fascinating and challenging, is not always pleasant. The experience of cross-examination may be downright unpleasant, if not intimidating. Nevertheless, expert work is often extremely rewarding. It requires the QS to operate at the top of his game and involves liaising and working with very interesting people. Whilst the author commends expert work to any aspiring QS, a rigorous course of study and training should be undertaken before accepting any appointments.

Michael Charlton
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1 [1993] 2 Lloyd's Rep 68, per Cresswell J (High Court, England & Wales).
2 [2004] EWHC 1748, unreported (Technology and Construction Court (TCC), England & Wales)
3 [2001] EWHC Ch 455, unreported (TCC).
4 See also Code of Conduct at Appendix D to the RHC.
5 *Sunbond Engineering Ltd v Konwall Construction & Engineering Co Ltd*, unreported, 25 May 2004.
6 *Tang Ping-choi v Secretary for Transport* [2004] 2 HKLRD 284 (Court of Appeal).
7 See RHC, Ord 38.
8 *Meadow v General Medical Council* [2006] EWCA Civ 1390, unreported (Court of Appeal, England & Wales).